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No.88-1977

IN THE

# Supreme Court of the United States

October Term, 1988

In Re:

THE BIBLE SPEAKS,

*Debtor.*

THE BIBLE SPEAKS, INC.,

*Petitioner,*

-against-

ELIZABETH DOVYDENAS,

*Respondent.*

## BRIEF OF THE OLD-TIME GOSPEL HOUR AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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### PRELIMINARY STATEMENT

The Old-Time Gospel Hour ("OTGH") submits this brief amicus curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit filed by The Bible Speaks, Inc. All parties to this suit have given OTGH written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

## INTEREST OF THE AMICUS

The Old-Time Gospel Hour is a non-profit, religious, educational, and charitable organization that is an integral part of Thomas Road Baptist Church and its related ministries in Lynchburg, Virginia. Founded and led today by Reverend Jerry Falwell, these ministries include Liberty University, Lynchburg Christian Academy, the Liberty Godparent Ministry to pregnant women, evangelism ministries in the United States and abroad, radio and television broadcasting, and the Fundamentalist Journal and other publications. The ministries exist to spread the gospel of Jesus Christ and persuade men and women in every community of the world to accept Jesus Christ as their Lord and Savior. The ministries received over $100 million in gifts during the fiscal year ended June 30, 1989. In each of its recent fiscal years, Thomas Road Baptist Church and its related ministries received at least one gift of over $1 million from one or more individuals with whom Reverend Falwell has spent substantial amounts of time, and with whom he had become personally friendly before the gifts were given.

In his public and private teaching, counselling, and instruction, Reverend Falwell faithfully teaches and practices the Biblical commands that Christians should give both tithes and offerings in support of the work of God's kingdom. While Reverend Falwell is careful in all of his public and private relationships to respect the stewardship that God has given to those who support Thomas Road Baptist Church and its related ministries, the experience of The Bible Speaks in this case demonstrates that donors, who may become disaffected for a variety of reasons unrelated to the manner in which the ministry has been conducted, occasionally attempt to reclaim large gifts, alleging they were obtained by undue influence.

The Old-Time Gospel Hour believes that, to allow a donor to reclaim a gift to a church or religious organization without proof by clear and convincing evidence that it would not have been given but for the undue influence exerted by the donee, violates the donee's rights under the First Amendment's Free Exercise Clause and cannot be permitted by the Court.

## QUESTIONS PRESENTED AND STATEMENT OF THE CASE

The Old-Time Gospel Hour adopts the questions presented and statement of the case as set forth in the petition for certiorari filed by The Bible Speaks, Inc. ("TBS").

## ARGUMENT

America is a religious nation. As the late Justice Douglas said well,

> We are a religious people, and our institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

*Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The vitality of Justice Douglas' statement is nowhere more evident than in the First Amendment's guarantee that "Congress shall make no law . . . prohibiting the free exercise [of religion]". Passionate and devoted religious belief and practice pervades the history of the founding of our nation, fuels many of the social controversies that preoccupy Congress and the courts, and inspires the lives of millions who, like Elizabeth Dovydenas, are faithful members of and contributors to local churches in every community of America. Thus it is that this Court should be especially watchful of the Free Exercise rights of those who act on the basis of their religious beliefs.

Because it shares TBS' belief that TBS' Free Exercise rights have been denied by the courts below, The Old-Time Gospel Hour strongly agrees with and supports TBS' petition for certiorari. OTGH believes that the petition accurately sets forth the material facts necessary for the Court to understand and review the decision of the Court of Appeals; delineates the errors of law committed by the lower courts; and persuasively argues why this Court should

establish clear standards for application of the law of "undue influence" to gifts to churches and other religious organizations.

The passion of religious belief, derived from the believer's service of a higher Person or Cause and from its usually inherent unified world and life view, often leads the believer to make statements or take action which would be considered by an infidel to be irrational, illogical, or untrue. Kamikaze pilots served the divine emperor of Japan; in Martin Luther's day, thousands purchased "indulgences" to free souls from purgatory; Jesus Christ allowed himself to be crucified.

Unquestionably, it is unusual for a wealthy young woman, 34 years old, to adopt new religious beliefs, become estranged from her husband, and make large gifts of a substantial portion of her wealth to a small and newly-established church. To some, it may be illogical or irrational for her to make such gifts without seeking the advice of supposedly sophisticated tax and financial counsellors, and against the wishes of her husband and her father. Many of the same people think it untrue that gifts of money may have, by some supernatural means, *apparently* unrelated effects, such as the cure of headaches in another, or the release of someone from official custody.

To the believer, however, these are all religious sacrifices whose supernatural benefits are beyond the explanation of modern science or "objective" observers. The genius of the Free Exercise Clause is that it forbids the Congress, the state legislatures, and the courts, in all but the most compelling circumstances, *Hernandez v. Commissioner*, ___ U.S. ___, 57 U.S.L.W. 4593 (1989); *United States v. Lee*, 455 U.S. 252 (1982), from sitting in judgment over the truth, rationale, or logic of any religious belief, thereby removing the government from adopting any heresy, dogma, or sect. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

With this background in mind, we turn to the need for the Court to act in this case to protect TBS' Free Exercise rights, and to establish standards for courts to use in deciding future cases. The court below may not impose a significant burden on TBS' Free Exercise rights without (1) justifying that burden by protecting a

compelling governmental interest and (2) considering whether a less burdensome means of protecting the same interest is available.

The law of undue influence is clear: (1) the donor must be a person susceptible to influence; (2) undue influence must have been exercised, by the donee or his agent; and (3) in making the gift, the donor must have submitted to the "overmastering effect" of the undue influence. *Bruno v. Bruno*, 384 Mass. 31, 422 N.E. 2d 1369 (1981); *McDonald v. McNeil*, 300 Mass. 350, 15 N.E. 2d 460 (1938); *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass App. Ct. 412, 402 N.E. 2d 76 (1980). The parties stipulated the susceptibility of Mrs. Dovydenas to influence, and *amicus* does not dispute the lower courts' conclusion that undue influence was exercised.

However, the Court of Appeals below imposed an intolerable burden on TBS by failing to apply the proper legal standard to determine whether, in making the $5 million gift, Mrs. Dovydenas submitted to the *overmastering effect* of the undue influence:

> If plaintiff had been told that Baum's headaches had not been cured by her first gift of $1,000,000, she *may not* have made the second gift at all. If she had not been influenced to keep the gift a secret from her husband and family, she *may not* have gone through with it. If she had been told that Turkia was in no danger, she *probably would not have* accelerated the gift.

*The Bible Speaks, Inc. v. Dovydenas*, 869 F.2d 628, 644 (lst Cir. 1989) (emphasis added), Appendix to Petition for Certiorari at *41a*.

Not only does this conclusive paragraph of the court's opinion concerning the $5,000,000 gift clearly demonstrate its failure to apply the proper legal standard, the passage also demonstrates the court's reliance on clearly religious factors, such as the family conflict arising out of Mrs. Dovydenas' religious beliefs, or the power of gifts to heal, to support its affirmance of the trial court.

The burden on TBS is clear: The decision below has stripped TBS of $5,000,000 worth of real estate — which Mrs. Dovydenas

specifically directed should be improved with her gift – and forced it to cease its operations

The less burdensome alternatives that the court below failed to adopt — or even consider — are equally clear. Before a court may require restitution of a gift to a church or religious organization, allegedly made as a result of undue influence, the plaintiff must demonstrate, by *clear and convincing evidence* –no less than is required to support a claim for restitution of property obtained by fraud — that the gift would not have been made *but for* the susceptibility of the donor to influence, *but for* the exercise of undue influence by the donor, and *but for* the donor's submission to the "overmastering effect" of that influence.

The need for the Court to rule in this case is further highlighted by the divergence between the "may not have" standard applied by the First Circuit and the "but for" rules traditionally applied in undue influence cases involving churches, *e.g.*, *Hensley v. Stevens*, 156 Mont. 486, 481 P.2d 694, 697 (1971) (transfer was "the product of undue influence"); *Guill v. Wolpert*, 191 Neb. 805, 218 N.W. 2d 224, 234 (1974) (insufficient evidence presented to show that *inter vivos* gift was "the effect of" undue influence); *Spence v. Griffin*, 236 Va. 21, 372 S.E. 2d 595, 599 (1988) (evidence sufficient to support ruling that *inter vivos* conveyance was "induced by actual fraud"). While this case does not present a traditional "circuit conflict," *Hernandez v. Commissioner, supra*, 57 U.S.L.W. at 4596, a less stringent standard of proof that may be satisfied by those who complain of undue influence cannot be applied only to gifts to churches without patently violating the Free Exercise Clause.

Churches and religious organizations of all kinds operate in many different ways. However, a common characteristic is the presence of a charismatic leader who is able to clearly and persuasively communicate the doctrine of the faith; and inspire the congregation and individual members to faithful action — including the provision of financial support — based on those doctrines. The Old-Time Gospel Hour is a ministry of Thomas Road Baptist Church, whose pastor is Reverend Jerry Falwell. By reason of the abilities God has given him, Reverend Falwell has been able,

publicly and privately, to exert substantial influence over both the church's congregation and those who read Old-Time's publications and listen to its radio and television programs. Many of these people have given substantial gifts to Thomas Road Baptist Church, The Old-Time Gospel Hour, and other related ministries. To permit the freely-given gifts of one who later turns away from the faith to be returned to the disaffected donor, merely because the donor *may not have* made the gift under different circumstances, tramples on the Free Exercise rights of churches and religious organizations across the country that teach their adherents the Biblical principle of giving tithes and offerings to support the ministry, and of giving liberally out of the wealth God has given them.

## CONCLUSION

The Free Exercise Clause of the First Amendment stands as a faithful guardian of the rights of churches and their leaders to freely teach and practice their religious beliefs. No surer way to destroy the churches of America could be found than to permit the courts to strip them of gifts made for and used in their religious activities by allowing a wealthy, disaffected donor to reclaim a gift merely because, after being "deprogrammed," she presents some evidence that she may not have made the gift had she not been influenced by the church's teachings that God wanted her to use her wealth to benefit the church. The First Circuit's decision, by stripping the church of a substantial portion of its property without requiring plaintiff to prove that she would not have made the gifts to the church *but for* the undue influence exerted by its pastor, threatens the ability of any church to retain the gifts it receives and uses in its ministry.

For the foregoing reasons, along with those set forth in the petition for certiorari, The Old-Time Gospel Hour respectfully urges that The Bible Speaks' petition for certiorari be granted.

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